

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

HIGH SIERRA PROPERTIES,  
INC.,

Plaintiff and Respondent,

v.

JESSE MITCHELL,

Defendant and Appellant.

B280201

(Los Angeles County  
Super. Ct. No. VC061943)

APPEAL from an order of the Superior Court of Los Angeles County, John A. Torribio, Judge. Affirmed.

Law Offices of Kevin E. Robinson and Kevin E. Robinson  
for Defendant and Appellant.

Law Offices of Steven P. Scandura and Steven P. Scandura  
for Plaintiff and Respondent.

---

Jesse Mitchell appeals from an order denying his motion for attorney's fees. High Sierra Properties, Inc. (High Sierra) brought a lawsuit for fraud against Mitchell individually and as the alter ego and agent of Whittier Intercommunity Medical Partnership (Whittier Intercommunity), which sold High Sierra a commercial office building. High Sierra also named as defendants lessee Whittier Surgical Partners and Louis Kang, Whittier Intercommunity's principal, and other entities and individuals. High Sierra alleged Mitchell, Kang, Whittier Intercommunity, Whittier Surgical Partners, and others made misrepresentations that inflated the sales price of the building. After the trial court granted Mitchell's motion for nonsuit at trial and entered a judgment of dismissal, Mitchell filed a motion to recover his attorney's fees based on a fees provision in the purchase agreement between High Sierra and Whittier Intercommunity. The trial court denied Mitchell's motion.

On appeal, Mitchell contends that because High Sierra's complaint alleged he was an alter ego and agent of Whittier Intercommunity, he is entitled to the benefit of the attorney's fees provision in the purchase agreement. We affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### *A. High Sierra's Complaint*

High Sierra initiated this action on September 20, 2012. High Sierra's operative second amended complaint alleged High Sierra purchased a commercial office building from Whittier Intercommunity in April 2010, and assumed all existing leases of office space. Prior to the sale, Kang and other defendants presented High Sierra with a fraudulent "Estoppel Certificate,"

which misrepresented the lease terms of anchor tenant Whittier Surgical Partners, including its rent amount and that Whittier Surgical Partners was current on its rent. Kang conspired with Whittier Surgical Partners and others to misrepresent the lease terms in order to inflate the sales price of the building.

High Sierra's first cause of action for fraud<sup>1</sup> alleged Mitchell made, joined in, conspired to make, or aided and abetted the fraudulent misrepresentations made to High Sierra. The second amended complaint further alleged Mitchell, "if not directly involved in the fraud, acted recklessly and without regard for the truth of the representations made in the Estoppel Certificate and actively promoted" the false rent amounts. High Sierra alleged Mitchell was an agent and alter ego of Whittier Intercommunity, Whittier Surgical Partners, and all other defendants. For example, High Sierra specifically alleged "the separateness of" Mitchell and Whittier Intercommunity, as well as other defendants, "was a mere fiction aimed at shielding the perpetrators from the consequences of their fraud." High Sierra sought special, general, and punitive damages, and "attorney's fees pursuant to contract."

B. *Mitchell's Motion for Nonsuit and Motion for Attorney's Fees*

The trial commenced on June 1, 2016. After High Sierra made its opening statement, Mitchell moved for a nonsuit. The trial court granted Mitchell's motion, and on August 2, 2016 the court entered judgment for Mitchell.

---

<sup>1</sup> High Sierra also alleged a second cause of action for fraudulent conveyance against Doe defendants only.

On November 1, 2016 Mitchell filed a motion to determine his status as prevailing party and for attorney's fees under Code of Civil Procedure section 1021 and Civil Code section 1717.<sup>2</sup> Mitchell attached a copy of the purchase agreement between High Sierra and Whittier Intercommunity. The agreement contained a provision that stated, "ATTORNEY'S FEES: In any litigation, arbitration, or other legal proceedings which may arise between any of the parties hereto, including Agent, the prevailing party shall be entitled to recover as costs, including costs of arbitration, and reasonable attorney fees in addition to any other relief to which such party may be entitled." Mitchell argued that although he was not a signatory to the purchase agreement, he was entitled to attorney's fees because High Sierra alleged he was an alter ego of signatory Whittier Intercommunity.

High Sierra argued in its opposition that Mitchell could not recover attorney's fees under the purchase agreement because High Sierra sued it for fraud, not breach of contract, and thus the right to reciprocal attorney's fees under section 1717 did not apply. The trial court denied Mitchell's motion.

## DISCUSSION

### A. *Standard of Review*

Mitchell contends we should review the trial court's order de novo; High Sierra contends we should review the order for an abuse of discretion. Mitchell is correct.

---

<sup>2</sup> All further undesignated statutory references are to the Civil Code. Defendant Whittier Outpatient Surgery Center also moved for attorney's fees, but that motion is not at issue in this appeal.

Although the normal standard of review of a trial court's determination on a motion for attorney's fees is abuse of discretion, "a determination of the legal basis for an attorney fee award is a question of law to be reviewed de novo." (*Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2017) 3 Cal.5th 744, 751 (*Mountain Air*); accord, *John Russo Industrial Sheetmetal, Inc. v. City of Los Angeles Dept. of Airports* (2018) 29 Cal.App.5th 378, 385.) Contrary to High Sierra's argument, the material facts are not in dispute. Rather, we must decide the legal question whether Mitchell as a nonsignatory to the purchase agreement is entitled to the benefit of the attorney's fees provision based on High Sierra's allegation Mitchell was the alter ego and agent of a signatory, Whittier Intercommunity. Therefore, this legal question is subject to de novo review. (*Mountain Air*, at p. 751 ["[W]here the material facts are largely not in dispute, our review is de novo."]; *Orien v. Lutz* (2017) 16 Cal.App.5th 957, 961 ["We review de novo a determination of an award of attorney fees under a contractual provision where, as here, no extrinsic evidence has been offered to interpret the contract, and the facts are not in dispute."].)

B. *The Trial Court Did Not Err in Denying Mitchell's Motion for Attorney's Fees*

"Under the American rule, each party to a lawsuit ordinarily pays its own attorney fees. [Citation.] Code of Civil Procedure section 1021, which codifies this rule, provides: 'Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties . . . .' In other words, section 1021 permits parties to

“contract out” of the American rule’ by executing an agreement that allocates attorney fees. [Citations.] Thus, “[p]arties may validly agree that the prevailing party will be awarded attorney fees incurred in any litigation between themselves, whether such litigation sounds in tort or in contract.” [Citations.]” (*Mountain Air, supra*, 3 Cal.5th at p. 751; accord, *Santisas v. Goodin* (1998) 17 Cal.4th 599, 607-608 & fn. 4 (*Santisas*) [Code Civ. Proc., § 1021 “does not independently authorize recovery of attorney fees”]; *Cargill, Inc. v. Souza* (2011) 201 Cal.App.4th 962, 966 [“Each party to a lawsuit must pay his or her own attorney fees except where a statute or contract provides otherwise.”].)

Acknowledging this general rule, Mitchell relies on the attorney’s fees provision in the purchase agreement between High Sierra and Whittier Intercommunity as the contractual basis for his request for fees. Mitchell contends this provision, by referring to “any litigation . . . between any of the parties,” encompasses High Sierra’s action for fraud.

The challenge for Mitchell is that he was not a party to the purchase agreement. Rather, he asserts he has a right to recover attorney’s fees as an alleged alter ego of High Sierra. We first consider whether the contracting parties mutually intended to provide for attorney’s fees to Mitchell, as an alleged alter ego of Whittier Intercommunity. (See § 1636 [“A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.”]; *Mountain Air, supra*, 3 Cal.5th at p. 752 [“we first consider the mutual intention of the parties at the time the contract providing for attorney fees was formed”].) “Our initial inquiry is confined to the writing alone.” (*Mountain Air*, at p. 752.)

Because the attorney's fees provision allows the prevailing party to recover attorney's fees in an action "between any of the parties," and Mitchell was not a party to the agreement, the language of the agreement itself does not provide a basis for his recovery of attorney's fees. Mitchell argues instead that because High Sierra alleged he was the alter ego of Whittier Community, he "stand[s] in the shoes of Whittier Intercommunity," and can claim the benefit of the purchase agreement. But none of the cases cited by Mitchell stands for the proposition an alter ego can enforce an attorney's fees provision or other obligations of a contractual agreement. (See e.g., *Riddle v. Leuschner* (1959) 51 Cal.2d 574, 580 [concluding there was "unity of interest and ownership" as to some but not all defendants to support judgment against them]; *D.N. & E. Walter & Co. v. Zuckerman* (1931) 214 Cal. 418, 420 [guarantor of debt of individual doing business as corporation was liable for debt of corporation where it was alter ego of individual].) In addition, this argument runs counter to Mitchell's position he was not an alter ego of Whittier Intercommunity.

Mitchell contends in the alternative he has a reciprocal right to attorney's fees because High Sierra sought contractual attorney's fees from him in its second amended complaint, and had High Sierra prevailed on its alter ego claim against Mitchell, it would have been entitled to attorney's fees under the contract. As section 1717, subdivision (a), provides, "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the

contract or not, shall be entitled to reasonable attorney's fees in addition to other costs."

Section 1717 operates in at least two distinct ways. "The first situation in which section 1717 makes an otherwise unilateral right reciprocal, thereby ensuring mutuality of remedy, is 'when the contract provides the right to one party but not to the other.' [Citation.] In this situation, the effect of section 1717 is to allow recovery of attorney fees by whichever contracting party prevails, 'whether he or she is the party specified in the contract or not' (§ 1717, subd. (a)). [¶] The second situation in which section 1717 makes an otherwise unilateral right reciprocal, thereby ensuring mutuality of remedy, is when a person sued on a contract containing a provision for attorney fees to the prevailing party defends the litigation 'by successfully arguing the inapplicability, invalidity, unenforceability, or nonexistence of the same contract.' [Citation.] Because these arguments are inconsistent with a contractual claim for attorney fees under the same agreement, a party prevailing on any of these bases usually cannot claim attorney fees as a contractual right. If section 1717 did not apply in this situation, the right to attorney fees would be effectively unilateral—regardless of the reciprocal wording of the attorney fee provision allowing attorney fees to the prevailing attorney—because only the party seeking to affirm and enforce the agreement could invoke its attorney fee provision." (*Santisas, supra*, 17 Cal.4th at pp. 610-611, 614-615 [prevailing defendant entitled to recover attorney's fees on claim for breach of contract]; accord, *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 128 (*Reynolds Metals*) [the purposes of § 1717 require the section "be interpreted to further provide a reciprocal remedy for a



nonsignatory defendant, sued on a contract as if he were a party to it, when a plaintiff would clearly be entitled to attorney's fees should he prevail in enforcing the contractual obligation against the defendant"].)

Under section 1717, Mitchell would have been entitled to recover attorney's fees as the alleged alter ego of Whittier Intercommunity on a claim for breach of the purchasing agreement. (*Reynolds Metals, supra*, 25 Cal.3d at p. 129 [prevailing nonsignatory defendant sued as alter ego of signatory entitled to contractual attorney's fees under § 1717]; *Brown Bark III, L.P. v. Haver* (2013) 219 Cal.App.4th 809, 819 [prevailing nonsignatory defendant sued for breach of contract under successor liability theory entitled to attorney's fees under § 1717 for defense of that claim].) However, as Mitchell concedes, section 1717 does not apply to High Sierra's cause of action for fraud because section 1717 is limited by its own terms to actions on a contract. (See *Santisas, supra*, 17 Cal.4th at pp. 614-615 ["We agree with the Court of Appeal majority that this action is outside the ambit of section 1717 insofar as it asserts tort claims."]; *Stout v. Turney* (1978) 22 Cal.3d 718, 730 ["A tort action for fraud arising out of a contract is not, however, an action 'on a contract' within the meaning of [section 1717]."]; *Monster, LLC v. Superior Court* (2017) 12 Cal.App.5th 1214, 1226 ["As a general matter, '[t]ort and other noncontract claims are not subject to section 1717 and its reciprocity principles.']; *Brown Bark III, L.P.*, at pp. 827-829 [nonsignatory could recover attorney's fees under contract for defense of contract claims, but not tort claims for conversion and fraud].)

Mitchell contends the Supreme Court's holding in *Reynolds Metals* allowing recovery of attorney's fees by a nonsignatory to a

contract sued on an alter ego theory supports his position because the holding was not rooted in the court's application of section 1717. Mitchell is mistaken. *Reynolds Metals* expressly interpreted and relied on section 1717 in reaching its conclusion. (See *Reynolds Metals, supra*, 25 Cal.3d at p. 129 [because defendants "would have been liable for attorney's fees pursuant to the fees provision had plaintiff prevailed, they may recover attorney's fees pursuant to section 1717 now that they have prevailed"].)<sup>3</sup>

Mitchell's reliance on *Dryer v. Los Angeles Rams* (1985) 40 Cal.3d 406 and *Rowe v. Exline* (2007) 153 Cal.App.4th 1276 is also misplaced. *Dryer* and *Rowe* involved whether a nonsignatory to a contract containing an arbitration clause was entitled to compel arbitration when it was sued as an agent or alter ego of a signatory. (See *Dryer*, at p. 418 [nonsignatories sued as agents of signatory in dispute arising from contractual relationship between the parties could enforce arbitration provision in contract]; *Rowe v. Exline*, at p. 1285 [nonsignatories sued for breach of contract as alter egos of signatory corporation could compel arbitration under the agreement].) But California law on the construction of arbitration provisions differs from that on the recovery of attorney's fees. "California law favors alternative dispute resolution as a viable means of resolving legal conflicts." (*Richey v. AutoNation, Inc.* (2015) 60 Cal.4th 909, 916; accord,

---

<sup>3</sup> Mitchell also relies on *Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338, 1344, but in that case the prevailing defendants on the tort claims were parties to a purchase agreement that provided for attorney's fees arising from the agreement, and the court concluded the claims arose from the agreement.

*Cohen v. TNP 2008 Participating Notes Program, LLC* (2019) 31 Cal.App.5th 840, 868 [same].) By contrast, California law contemplates “each party to a lawsuit ordinarily pay[ing] its own attorney fees,” absent a statute or agreement to the contrary. (*Mountain Air, supra*, 3 Cal.5th at p. 751; accord, Code Civ. Proc. § 1021.)

Mitchell has identified no statute under which he may recover his attorney’s fees, and no agreement to which he is a party.<sup>4</sup> While we recognize the result is inequitable, under California law the American rule applies, and Mitchell may not recover his attorney’s fees from High Sierra.

## DISPOSITION

The judgment is affirmed. Respondent is to recover its costs on appeal.

FEUER, J.

WE CONCUR:

PERLUSS, P. J.

ZELON, J.

---

<sup>4</sup> Mitchell’s argument he should be allowed to recover his attorney’s fees to address the prejudice he suffered from defending himself in the action lacks any citation to authority for granting him relief.